

2011 WL 597673 (Ind.App.) (Appellate Brief)  
Court of Appeals of Indiana.

DOE CORPORATION, an Anonymous Healthcare Provider, Appellant (Petitioner/Defendant Below),  
v.

Lolita C. HONORÉ, Special Representative of the Estate of Andrea  
Honoré, Deceased, Appellee (Respondent/Plaintiff Below).

No. 49A05-1007-MI-00408.  
January 18, 2011.

Appeal from the Marion Superior Court, Trial Court No.  
49D03-0907-MI-034432, The Honorable Patrick McCarty, Judge

**Joint Brief of Amici Curiae Indiana Health Care Association, Hoosier Owners and  
Providers for the **Elderly**, and Indiana Association of Homes and Services for the Aging**

Peter J. Rusthoven [# 6247-98], Barnes & Thornburg LLP, 11 South Meridian Street, Indianapolis, Indiana 46204, Telephone: (317) 236-1313, Counsel for Amici Curiae, Indiana Health Care Association, Hoosier Owners and Providers, for the **Elderly** and Indiana Association of Homes and Services for the Aging.

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## **\*1 INTERESTS OF AMICI CURIAE**

The Indiana Health Care Association (“IHCA”), Hoosier Owners and Providers for the **Elderly** (“HOPE”) and the Indiana Association of Homes and Services for the Aging (“IAHSA”) are Indiana associations whose respective members include numerous health care providers as defined by the Indiana Medical Malpractice Act, *Ind. Code § 34-18-1-1 et seq.* (“Malpractice Act” or “Act”). See *Ind. CODE § 34-18-2-14* (defining “health care provider”). IHCA is Indiana's largest trade association and advocate representing proprietary, not-for-profit and hospital-based nursing home and assisted living communities, adult foster care and adult day services. HOPE represents Hoosier-owned or -operated nursing homes and assisted and independent living communities. Its members include 87 communities with approximately 7,000 nursing beds, 1,000 assisted living units, and 120 independent living apartments. IAHSA comprises 150 nonprofit organizations that operate nursing homes, continuing care retirement communities, assisted living facilities, and senior housing and services.

As Hoosier health care providers, the respective members of IHCA, HOPE and IAHSA have critical interests in proper interpretation and application of our Medical Malpractice Act, including as to proper evaluation of medical malpractice claims that may be brought against them. Those interests include proper resolution of an important issue presented in this appeal between appellant Doe Corporation, an anonymous health care provider that is the petitioner and defendant in the underlying trial court proceeding (“Doe”), and appellee Lolita C. Honore, as Special Representative of the Estate of Andrea Honore, Deceased, who is the respondent and plaintiff in that underlying proceeding (“Honore”).

Under the Malpractice Act, a medical malpractice claim, such as that sought to be brought by Honore against Doe, must be reviewed by a “medical review panel” before it may be \*2 filed in court. The review panel will render expert opinions, admissible in subsequent litigation, on whether the pertinent medical standard of care was breached, and on medical causation of a plaintiff's alleged injuries. Under Indiana law, nurses are not permitted to opine on medical standard of care and medical causation issues, because such issues are beyond their expertise. The question in this appeal that is of vital import to *amici curiae* is whether nurses, when serving on a medical review panel under the Act, may nonetheless participate in determining the panel's medical standard of care and medical causation opinions.

The Malpractice Act's purposes include protecting health care providers from malpractice claims not supported by the requisite expert medical opinions, thus reducing insurance and other costs and promoting availability of affordable health care services for Hoosiers. The requirement that proposed malpractice claims first be evaluated by medical review panels is one of the important means by which the Act furthers these vital policy objectives. IHCA, HOPE and IAHSAs respectfully submit that allowing nurses to participate in determining a medical review panel's expert opinion on medical standard of care and medical causation issues - matters on which nurses lack the necessary training and expertise to opine - would both violate Indiana law and subvert the purposes of our Malpractice Act.

### \*3 SUMMARY OF ARGUMENT

Indiana Jaw is dear that nurses may not opine on medical standard of care and medical causation issues, on which only medical doctors have the requisite training and experience to provide expert testimony. Indeed, this Court has twice reaffirmed in 2010 that views of nurses on medical causation are not admissible evidence.

While our Malpractice Act allows nurses to serve on medical review panels, it does not provide that nurses may participate in panel decisions on medical standard of care and causation issues - matters on which nurses are not qualified to opine. Since the Act makes a panel's decision admissible as "expert" evidence in a malpractice action, to interpret it as allowing nurse members of such panels to vote on medical standard of care and causation would overrule consistent judicial authority that nurses lack the requisite expertise to evaluate and testify on such matters. That mistaken interpretation would also put Act in conflict with [Evidence Rule 702](#) on qualifications for expert testimony - a conflict on which [Rule 702](#) would prevail in any event.

That interpretation also cannot be reconciled with "[the] obvious purpose of the Medical Malpractice Act[, which] is to provide some measure of protection to health care providers from malpractice claims, thus to preserve the availability of such professional health care services to the community." [Warrick Hosp. v. Wallace](#), 435 N.E.2d 263, 267 (Ind. Ct. App. 1982). The medical review panel process is one of the Act's principal means of advancing that purpose. The view urged here by Honore turns the Act on its head, transforming a statute intended to protect health care providers from unsubstantiated malpractice claims - thereby promoting availability of affordable health care services to Hoosiers - into a backdoor device *relaxing* the evidentiary requirements for malpractice claims. *Amici curiae* respectfully submit that this would be manifestly incorrect as matter of vital public policy as well as law.

### \*4 ARGUMENT

Indiana prerequisites for a medical malpractice claim are straightforward:

To establish a *prima facie* case of medical malpractice, a plaintiff must provide "expert testimony in order to show that the physician's performance fell below the applicable standard of care and that his negligence was the proximate cause of the plaintiffs injuries."

*Dughaish ex rel. Dughaish v. Cobb*, 729 N.E.2d 159, 164 (Ind. Ct. App. 2000) (citation omitted), *trans. denied; accord, e.g., Desai v. Croy*, 805 N.E.2d 844, 850 (Ind. Ct. App. 2004) ("Because of the complex nature of medical diagnosis and treatment, expert testimony is generally required to establish the applicable standard of care") (citation omitted), *trans. denied*.

This Court has squarely held that nurses are not qualified to provide the requisite expert evidence on these core medical standard of care and medical causation issues. Because of the "significant difference" between physicians and nurses "in the scope of their diagnostic and treatment authority," a nurse "is not qualified to offer expert testimony on the standards of care for physicians." *Stryczek v. Methodist Hosps., Inc.*, 694 N.E.2d 1186, 1189 (Ind. Ct. App. 1998), *trans. denied*. For the same reasons, nurses may not opine on medical causation;

Because there is a significant difference in the education, training, and authority to diagnose and treat diseases between physicians and nurses, we hold that the determination of the medical cause of injuries, which is obtained through diagnosis, for purposes of offering expert testimony is beyond the scope of nurses' professional expertise. Thus, we now hold that nurses are not qualified to offer expert testimony as to the medical cause of injuries.

*Long v. Methodist Hosps. of Ind., Inc.*, 699 N.E.2d 1164, 1169 (Ind. Ct. App. 1998) (footnote omitted), *trans, denied*

Our Supreme Court has embraced this reasoning:

In general, the use of suitable professional skill must be proven by the testimony of other physicians or surgeons. *Stryczek v. Methodist Hospitals, Inc.*, 694 N.E.2d 1186, 1189 (Ind. Ct. App. 1998) (a nurse has neither the same training or \*5 education as physicians and despite extensive experience in *nursing is not* qualified as an expert with respect to care by a physician).

*Wooley v. State*, 716 N.E.2d 919, 927 (Ind. 1999) (affirming refusal to allow nurse to give medical opinion testimony).

In 2010, this Court twice reaffirmed that nurses may not opine on medical causation. In *Clarian Health Partners, Inc. v. Wagler*, plaintiff claimed a nurse's affidavit created a material fact issue on medical causation, precluding summary judgment for the provider. This Court disagreed:

Based upon *Long*, we conclude that Nurse Little's affidavit was inadmissible for the purpose of creating an issue of fact regarding whether Clarian's actions were the proximate cause of Wagler's injuries.

925 N.E.2d 388, 398 (Ind. Ct. App. 2010), *trans, denied*.

*Nasser v. St. Vincent Hospital & Health Services* also followed *Long* to reach the same conclusion. In *Nasser*, the nurse whose affidavit was claimed to create material fact issues on medical causation had served on the review panel, where her view differed from that of the panel's two doctor members. *Nasser* held the nurse's causation opinion was inadmissible under [Evidence Rule 702](#), even if one believed that the Medical Malpractice Act itself, by allowing nurses to serve on review panels, would permit such testimony:

Cases such as this one, where a non-physician health care provider serves on a medical review panel and gives a minority opinion as to medical causation, take *Long* one step farther. That is, if a nurse (or some other non-physician health care provider) serves on a medical review panel and provides a minority opinion as to medical causation, is his or her opinion admissible in court to create a genuine issue of material fact in a summary judgment proceeding or to serve as substantive evidence at trial? According to [Section 34-18-10-23](#), the answer is yes. However, according to [Evidence Rule 702](#), the answer may be no. When there is a conflict between a statute and a rule of evidence, the rule of evidence prevails over any statute. Thus, in such a circumstance, [Evidence Rule 702](#) would prevail, and the nurse's (or other non-physician health care provider's) opinion as to medical causation would be inadmissible at either the summary judgment stage or trial.

\*6 . . . Since we have already determined in *Long* that there is a significant difference in the education, training, and authority to diagnose and treat diseases between physicians and nurses and that the determination of the medical cause of injuries for purposes of offering expert testimony is beyond the scope of nurses' professional expertise, Nurse Busacca is not qualified to give her expert opinion as to medical causation in this case. Indeed, under [Evidence Rule 702](#), Nurse Busacca does not have the qualifications to do so.

926 N.E.2d 43, 51-52 (Ind. Ct. App. 2010) (footnote and other citation omitted), *trans. denied*.

Under this controlling Indiana authority, nurses may not opine on medical standard of care or medical causation in malpractice cases. This is also the prevailing view in other States, some of which have relied on Indiana authority. See *Nelson v. Elba Gen. Hosp. & Nursing Home, Inc.*, 828 So. 2d 301, 304-05 (Ala. Civ. App. 2000) (“registered nurse is not qualified to testify as an expert with regard to medical causation”; there is “a vast difference in the education and training of a physician and education and training of a nurse and a vast difference in the activities they can perform”) (citing *inter alia Long*).<sup>1</sup>

No authority holds that the reasoning and result of controlling Indiana cases - which establish that nurses lack the requisite training and experience to offer opinions on medical standard of care or causation - are altered merely because a nurse is serving on a medical review panel under the Act, rather than directly testifying in court. To the contrary, *Clarian* rejected the argument - often advanced by plaintiffs in these cases - that nurse authority to opine on medical standard of care and causation issues had been established by *Hartlett v. St. Vincent's Hospital & \*7 Health Services*, 748 N.E.2d 921 (Ind. Ct. App. 2001), *trans. denied*. In fact, *Hartlett* held only that, as the Malpractice Act provides, nurses may *serve* on medical review panels. It neither states nor suggests that this somehow confers on nurses “expert” authority they otherwise lack, thereby allowing them to vote on medical standard of care and causation issues that our courts have held nurses are not qualified to evaluate - with the results of such votes then introduced into evidence at trial as the panel’s supposed “expert” opinion. See *Clarian*, 925 N.E.2d at 396, 398 (rejecting argument that “*Long* was ‘necessarily overruled’ by *Hartlett*” - “[r]ather, the court in *Hartlett* held that *Long* would not be *expanded* to the issue of whether a nurse could be a member of a medical review panel”) (original emphasis).

Moreover, as shown *supra*, *Nasser* explicitly rejected the view that nurses may offer medical standard of care and causation evidence even if one assumes that the Malpractice Act *would* permit them to do so. This would place the Act in conflict with the expert evidence requirements of **Evidence Rule 702**, which necessarily prevail in any conflict with a statute. See 926 N.E.2d at 51-52; see generally *Harrison v. State*, 644 N.E.2d 1243, 1251 n.14 (Ind. 1995) (Supreme Court’s Rules of Evidence prevail over any conflicting statute).

Allowing nurses to vote or opine on medical standard of care and causation issues would also subvert the purposes of the Act. As this Court and our Supreme Court have explained:

[T]he Indiana Medical Malpractice Act was enacted to meet the problems of rapidly escalating costs to physicians of malpractice insurance, the near unavailability of such coverage to physicians engaged in certain high risk specialties, and because “health care providers had become fearful of the exposure to malpractice claims and at the same time were unable to obtain adequate malpractice insurance at reasonable prices.” The legislature thus responded to the vital needs of the community to preserve the availability of health care services to the citizens of this state. The obvious purpose of the Medical Malpractice Act is to provide some measure of protection to health care providers from malpractice claims, thus to preserve the availability of such professional health care services to the community.

\*8 *Warrick Hosp. v. Wallace*, 435 N.E.2d 263, 267 (Ind. Ct. App. 1982) (quoting and citing *Johnson v. St. Vincent Hosp.*, 404 N.E.2d 585, 589-90 (Ind. 1980) (discussing initial version of Act)); accord, e.g., *Detterline v. Bonaventura*, 465 N.E.2d 215, 217-18 (Ind. Ct. App. 1984).

The concerns noted in *Warrick Hospital* “are of paramount importance.” *Yeager v. Bloomington Obstetrics & Gynecology, Inc.*, 585 N.E.2d 696, 699 (Ind. Ct. App.), summarily aff’d, 604 N.E.2d 598 (Ind. 1992). Establishing the Act’s medical review panel process was one of the principal methods the General Assembly selected to address these vital policy problems:

[O]ur legislature has vigorously intervened in the area of medical malpractice by enacting the Indiana Medical Malpractice Act out of concern for these very policy considerations. In furtherance of these policies, the Indiana Medical Malpractice Act provides, among several provisions designed to protect the practice of medicine from malpractice claims, for ... a medical review panel to review all proposed medical malpractice complaints.

*Id.*, 585 N.E.2d at 699 (citations omitted). Indeed, the review panel process is so important that the Act deprives trial courts of subject matter jurisdiction over medical malpractice claims that were not first submitted for panel review. See, e.g., *Putnam County Hosp. v. Sells*, 619 N.E.2d 968 (Ind. Ct. App. 1993).

“[T]he Indiana Supreme Court has [also] listed the benefits of first submitting to a medical review panel any claim against a health care provider.” *Detterline*, 465 N.E.2d at 218 (citing *Johnson v. St. Vincent Hospital*). Specifically, in rejecting a challenge to the constitutional validity of the Act’s required medical review panel process, the *Johnson* Supreme Court detailed the crucial role such panels play in furthering the Act’s objectives:

[T]he dominant aim of this Act as a whole is to preserve health care services for the community. The delay in instituting suit required by this challenged [medical review panel] provision must be reasonable in light of this aim if it is to pass constitutional muster. The delay accommodates the discernment of facts by the medical review panel and the forming of its expert opinion. The participation of the claimant, the insurer, and the health care provider in the panel processes results. Their knowledge and experience so gained will encourage the mediation \*9 and settlement of claims and discourage the filing of unreasonably speculative lawsuits. The mental, **financial** and time-consuming burdens imposed upon health care providers by lawsuits which should have been settled by their insurers or which should not have been instituted will be lessened, and the disruption of and impairment to their continued vital services reduced.

404 N.E.2d at 595.

In sum, controlling Indiana authority establishes that:

(a) nurses are “not qualified to offer expert testimony on the standards of care for physicians,” *Stryczek* 694 N.E.2d at 1189, and “not qualified to offer expert testimony as to the medical cause of injuries,” *Long*, 699 N.E.2d at 1169 (Ind. Ct. App. 1998), both of which are prerequisites for “establish[ing] a *prima facie* case of medical malpractice,” *Dughaish*, 729 N.E.2d at 164;

(b) the Medical Malpractice Act’s “obvious purpose” is “to provide some measure of protection to health care providers from malpractice claims,” *Warrick Hospital*, 435 N.E.2d at 267, not to make it *easier* to satisfy the evidentiary burdens for proving malpractice;

(c) the “dominant aim of the Act as a whole is to preserve health care services for the community,” *Johnson*, 404 N.E.2d at 595; and

(d) as our Supreme Court explained in *Johnson*, medical review panels play a key role in advancing these vital policy objectives.

Given the foregoing, it cannot credibly be contended that the Act’s medical review panels somehow were *also* intended to be a backdoor mechanism whereby nurses could indirectly give “expert” opinions about medical standard of care and medical causation issues on which - under unambiguous Indiana law - they are unqualified to opine. No logic supports this untenable proposition, which contradicts Indiana law that a *prima facie* case of malpractice requires \*10 qualified, expert physician testimony. Embracing the contrary view would also undermine the very purposes of our Medical Malpractice Act.

Preserving the Act’s purposes of protecting health care providers from unsupported malpractice claims is especially important for providers of nursing home care, such as the members of *amici* here. Recent years have seen an explosion of malpractice litigation against nursing homes, yielding dramatic increases in litigation and insurance costs, and thereby diverting scarce resources from resident care and threatening the ability of nursing homes to stay in business. Thus, the very concerns that moved

our Legislature to enact the Medical Malpractice Act are particularly acute for nursing homes - underscoring that the Act's protections for such health care providers should not be directly or indirectly weakened.<sup>2</sup>

Finally, the threat to the Act's objectives posed by Honoré's position is underscored by the inherent power of "expert" evidence, and the attendant potential of such evidence to be misleading. The United States Supreme Court emphasized these well-founded concerns in its seminal *Daubert* decision, which stiffened reliability requirements for admissibility of expert evidence. " 'Expert evidence can be both powerful and quite misleading because of the difficulty in evaluating it.' " *Daubert v. Merrell Dow Pharmas.*, 509 U.S. 579, 595 (1993) (citation omitted). "Unlike an ordinary witness, an expert is permitted wide latitude to offer opinions, including those that are not based on firsthand knowledge or observation." *Id.* at 592. The only \*11 reason for allowing this, of course, is that the expert has been shown to be *qualified* to offer such opinions based on his or her specialized education and experience in the pertinent field. In the Supreme Court's words, "this relaxation of the usual requirement of firsthand knowledge ... is premised on an assumption that the expert's opinion will have a reliable basis in the knowledge and experience of his discipline." *Id.*<sup>3</sup>

Indiana law is clear that while physicians possess the specialized education and experience allowing them to opine on medical standard of care and medical causation in malpractice cases, nurses do not. This law does not disappear, and nurses are not somehow endowed with the requisite expertise that only physicians possess, simply because a nurse serves on a medical review panel under our Medical Malpractice Act.

To hold otherwise turns the Malpractice Act on its head, converting crucial legislation designed to protect health care providers from unsubstantiated malpractice claims - and thereby promote continued availability of health care services to Hoosiers - into a backdoor device *relaxing* the evidentiary requirements for medical malpractice claims.

This is not and should not be Indiana law.

## \*12 CONCLUSION

For the foregoing reasons, this Court should make clear that nurses serving on medical review panels under the Indiana Medical Malpractice Act are not authorized to participate in the panel's evaluation and determination of medical standard of care and medical causation issues, on which the expertise of a physician is required to render any admissible opinion.

### Footnotes

- 1 Other cases comporting with Indiana law include *Elswick v. Nichols*, 144 F. Supp. 2d 758 (E.D. Ky. 2001) (nurse cannot opine on causation, as this is equivalent to medical diagnosis) (Kentucky law); *Taplin v. Luplin*, 700 So. 2d 1160 (La. Ct. App. 1997) (nurse unqualified to give expert testimony on whether doctor breached standard of care); *Waatti v. Marquette Gen. Hosp., Inc.*, 329 N.W.2d 526 (Mich. Ct. App. 1983) (nurse's testimony could not establish standard of care for emergency room treatment); *Flanagan v. Labe*, 666 A.2d 333 (Pa. Super. Ct. 1995) (nurse not competent to testify on medical causation in malpractice case), *aff'd*, 690 A.2d 183 (Pa. 1997); *Kent v. Pioneer Valley Hosp.*, 930 P.2d 904 (Utah Ct. App. 1997) (nurse unqualified to opine on proximate cause of nerve damage in action against health care provider); *Short v. Appalachian OH-9, Inc.*, 507 S.E.2d 124 (W. Va. 1998) (nurse unqualified to testify on cause or time of death, or possibility of resuscitation). See also Anno., *Admissibility of Expert Testimony by Nurses*, 24 A.L.R. 6TH 549, § 20 (2007).
- 2 The threats posed by increasing litigation against nursing homes are well-known. See, e.g., R. Patrick Bedell, *The Next Frontier in Tort Reform: Promoting the Financial Solvency of Nursing Homes*, 11 ELDER L.J. 361 (2004) (more lawsuits, "ever-increasing jury awards" and rising litigation costs "threaten the financial solvency of the nursing home industry"; "increasing elderly population" has "heightened the precariousness of the situation"); David G. Stevenson & David M. Studdert, *The Rise of Nursing Home Litigation: Findings from a National Survey of Attorneys*, 22 HEALTH AFFAIRS 219 (2003) (nationwide survey of plaintiff and defense attorneys shows "costs of nursing home litigation are substantial"; "findings elevate concerns about quality of nursing home care and indicate that litigation diverts resources from resident care, which may fuel quality problems"; "[n]ursing home litigation is now

widely recognized as one of the fastest growing areas of health care litigation”; “claims rates and nursing homes’ liability insurance premiums have soared”).

- 3 Although *Daubert*’s specific reliability tests “are not binding upon the determination of [Indiana] law evidentiary issues,” our Supreme Court “has held that the concerns driving *Daubert* coincide with the express requirement of [Indiana Evidence Rule 702\(b\)](#)” on reliability of expert evidence, and that “the federal evidence law of *Daubert* and its progeny is helpful to the [Indiana] bench and bar in applying [Indiana Evidence Rule 702\(b\)](#).” *Kubsch v. State*, 784 N.E.2d 905, 921 (Ind. 2003).